Supreme Court, U.S.
FILED
JAN 15 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-825

ENRESCO, INC., a Colorado corporation, and YUMA MANUFACTURING COMPANY, INC., a Colorado corporation,

Petitioners

v.

VALMONT INDUSTRIES, INC., a corporation, formerly VALLEY MANUFACTURING COMPANY; and FRANK L. ZYBACH, and ALBERT E. TROWBRIDGE, individuals

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

JOHN F. NORTH
McGRATH, NORTH, NELSON, SHKOLNICK & DWYER
1601 Woodmen Tower
Omaha, Nebraska 68102
H. ROBERT HENDERSON
HENDERSON & STROM
Des Moines, Iowa
MICHAEL A. WILLIAMS
DAWSON, NAGEL, SHERMAN & HOWARD
Denver, Colorado
Counsel for Respondent

PRIESMAN GRAPHICS -- OMAHA, NEBRASKA

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented for Review	2
Statutes and Rules Involved	2
Statement of the Case	3
Argument	4
(1) The inapplicability of Lear, Inc. v. Adkins	4
(2) The Petitioners' Motion Was Not Timely	9
(3) The Newly Discovered Evidence Could have been Discovered by Due Diligence Prior to Trial	10
(4) The Settlement Agreement Voluntarily Entered into between the parties is a Bar to Relief under Rule 60	11
Summary	17
Conclusion	18

TABLE OF CASES CITED

American Cyanamid Co. v. Lincoln Laboratories, Inc., (C.A. Ill., 1968) 403 F. 2d 486	9
County of Dakota v. Glidden, 113 U.S. 222 (1885)	17
Illinois Tool Works, Inc. v. Brunsing, (C.A. Cal., 1967) 378 F. 2d 234	9
Jamco, Inc. v. Carlson, 274 F. 2d 338 (10th Cir. 1959)	10
Klapprott v. United States, (1949) 335 U.S. 601, 336 U.S. 942	9
Lear, Inv. v. Adkins, 395 U.S. 653, 89 Sup. Ct. 1902, 23 L.Ed. 2d 610	7; 17
Protective Closures v. Clover Industries, Inc., 394 F. 2d 809	17

INDEX – Continued

TABLE OF STATUTES AND REGULATIONS CITED

	Page
Fed. Rules Civ. Proc., Rule 60(b), 28 U.S.C.	2, 6, 7, 9, 10, 17
28 U.S.C. Section 1292 (a) (4)	9
35 U.S.C. Section 102 (a)	2
35 U.S.C. Section 102 (b)	2
35 U.S.C. Section 103	2

TEXTS CITED

Moore's Federal Practice, Sec. 60.28	9

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-825

ENRESCO, INC., a Colorado corporation, and YUMA MANUFACTURING COMPANY, INC., a Colorado corporation,

Petitioners

v.

VALMONT INDUSTRIES, INC., a corporation, formerly VALLEY MANUFACTURING COMPANY; and FRANK L. ZYBACH, and ALBERT E. TROWBRIDGE, individuals

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (App. B of Petition) is unofficially reported at 167 USPQ 60. The opinion of the Court of Appeals for the Tenth Circuit (App. A of Petition) is reported at 446 F. 2d 1193.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Was the Petitioners' Motion under Rule 60(b) timely?

   (a) Was the Motion filed within one year from the entry of a "final judgment" as that term is used in Rule 60(b)(2)?

   (b) Was the Motion filed within a "reasonable time" after the entry of a "final judgment" as that term is used in Rule 60(b)(2)?

2. Did the Trial Judge abuse his discretion in finding that the newly discovered evidence could have been discovered by due diligence of the Petitioners in time to move for a new trial under Rule 59(b)?

3. Where adverse parties in a law suit voluntarily and in good faith enter into a Settlement Agreement after the entry of a judgment which is pending on appeal, or after the entry of a judgment which is pending on a Motion for a New Trial, does the cause of action which is the subject matter of the judgment merge in the Settlement Agreement and does the Settlement Agreement supersede the judgment so that it is not subject to vacation or modification under Rule 60(b)?

STATUTES AND RULES INVOLVED

The pertinent provisions of Rule 60 (B), 28 U.S.C. and Secs. 102 and 103 of Title 35, U.S.C., on which Petitioner relies are set forth in the Petition at pp. 4-5.

STATEMENT

Respondents (Plaintiffs in the Trial Court) instituted an action for patent infringement in July of 1967. Both Petitioners and Respondents engaged in extensive discovery prior to September of 1968 when this action was set for trial. One of the primary issues presented for trial was the validity of the Respondents' patent. After seven days trial, on September 16, 1968, the Trial Court made a specific finding at the conclusion of the trial that the Repondents' patent was valid and that the Petitioners' devices infringed (R 126-133).

On November 22, 1968, a hearing was held to consider certain matters raised by the Petitioners and also to enter a judgment reflecting the Court's findings of fact and conclusions of law of September 16, 1968. On November 22, 1968, the Court entered a Judgment that claims 8, 9, 10 and 13 of the Respondents' patent No. 2,604,359 are valid (R 1-3). The Judgment also found that the Petitioners' devices infringed the Respondents' patent. The Court set for a separate hearing the accounting between the parties, including independent issues relating to Respondents' alleged misuse of its patent, notice and damages. Hearings on these issues were held and on March 7, 1969, the Court filed a Memorandum Opinion and Order finding that Respondents did not misuse the patent in suit (R 207-221) and that Petitioners had notice of infringement prior to January of 1966 (R 225-226). On March 26, 1969, the Court entered an Order finding that the Respondents were entitled to a royalty of five percent (5%) for each device sold by Petitioners after January of 1966 and counsel were ordered to prepare a judgment in accordance with the Order relating to damages (R 228-229).

Petitioners treated the Judgment of November 22, 1968, the Memorandum Opinion and Order of March 7, 1969 and the Order relating to damages of March 26, 1969, as final judgments

and on April 4, 1969 filed a Notice of Appeal from each of the foregoing Judgment, Opinion and Orders (R 231).

On April 10, 1969 the Court entered Supplemental Findings of Fact relating exclusively to the issue of misuse and to the amount of damages (R 233-235) and entered a Judgment on the issues that Respondents had not misused their patent and that they were entitled to full equitable relief for infringement and were entitled to recover damages in the amount of $294,466.73 for infringements occurring prior to January 31, 1969, plus six percent (6%) interest and costs (R 1-3). It should be noted that the Supplemental Findings of Fact and Final Judgment entered April 10, 1969 did not contain any findings or conclusions relating to the validity of Respondents' patent. This matter had been settled by the Judgment entered November 22, 1968, which Judgment was the subject of Petitioners' Notice of Appeal filed April 4, 1969.

On April 23, 1969, Petitioners filed a Motion for an Order opening and setting aside the Judgment entered April 10, 1969, and for an Order granting a new trial for the purpose of taking testimony establishing that Respondents' invention was known and used by others and, therefore, had been anticipated to such an extent that Respondents' patent was invalid (R 240-242). It is interesting to note, in connection with the Motion, that Petitioners specifically alleged that they could not have obtained such testimony by due diligence. An analysis of the Affidavit filed in support of the Motion discloses that an individual in Kansas had developed a self-propelled sprinkler irrigation system, which allegedly anticipated the device invented by Respondents and, therefore, Respondents' patent was invalid.

During the months of April and May, the following matters were pending in connection with this case:

(1) Petitioners' Appeal from the Judgment dated November 22, 1968; the Memorandum Opinion and Order entered March 7, 1969; and the Order entered March 26, 1969; the only Judgments and Orders relating to validity of Respondents' patent.

(2) Petitioners' Motion to set aside the Judgment dated April 10, 1969, relating to misuse and damages, and related Motion for New Trial.

While these matters were pending and with full knowledge of the rights and remedies available to the parties, Petitioners and Respondents voluntarily, under no compulsion, in good faith and with full recognition of the rights and remedies of each, entered into a Settlement Agreement, June 13, 1969 (R 244-250). Under the Settlement Agreement, Respondents accepted an installment note in the amount of $280,000.00 for all of its claims against Petitioners. It was agreed that Petitioners' appeal would be dismissed. Such appeal was in fact dismissed (R 48). It was agreed that Respondents would release all bonds filed by Petitioners. Such bonds were released (R 251-252). Petitioners and Respondents performed to date each and every obligation provided by the Settlement Agreement and Petitioners have made payments on the settlement note in the amount of $230,000 plus interest.

In the Settlement Agreement, Petitioners did not admit validity of the patent in suit, a position from which Petitioners have never wavered; and no license or other rights were granted Petitioners under the patent; in fact, the patent was not mentioned therein. Significant to the present petition for certiorari is the fact that the patent, No. 2,604,359, expired in July of 1969, approximately a month after the Settlement Agreement. The validity of this patent is no longer a matter of significance to anyone.

On March 19, 1970, after Respondents had executed the Settlement Agreement and done everything required of them under the Settlement Agreement and after Petitioners had made two payments under the Settlement Agreement, Petitioners filed a Motion under Rule 60(b) of the Federal Rules of Civil Procedure to set aside the Judgment entered April 10, 1969, and to enter a summary judgment in their favor on the sole ground that Petitioners had newly discovered evidence.

Hearing was set on July 17, 1970 for the Motion of March 19, 1970, giving both parties ample time to prepare for same. At the hearing, both parties were fully heard and were given sufficient time to present all of their evidence as to the merits of the Motion. Neither party requested additional time from the Trial Judge for the presentation of other evidence.

After due and deliberate consideration of all of the briefs of both parties presented as to the Motion, of the evidence presented by both parties at the hearing, and of the oral arguments of counsel for the parties at the hearing, the Trial Judge found as to the Motion under Rule 60(b):

(1) The Petitioners were out of time;

(2) The Motion could not be maintained as the compromise agreement superseded the judgment in the case;

(3) The newly discovered evidence could have been discovered by due diligence of the Petitioners in time to move for a new trial under Rule 59(b); and

(4) Because of the fatal procedural deficiencies of (1) through (3) inclusive, a discussion of the anticipation issue would not be proper (R 313).

The Court of Appeals for the Tenth Circuit affirmed the decision of the District Court. The Circuit Court affirmed on

the ground that the District Court found that a diligent search prior to trial would have uncovered the alleged newly discovered evidence and the Trial Court did not abuse its discretion for denying the Motion under Rule 60(b) for failure to exercise due diligence to uncover the newly discovered evidence (App. A of Petition).

ARGUMENT

I. The Inapplicability of Lear and Massilon cases.

At the outset mention should be made of *Lear, Inc. v. Adkins*, 395 U.S. 653, 89 Sup. Ct. 1902, 23 L. Ed. 2d 610; not because the case is material in any way but simply because it is relied upon by Petitioners. Petitioners presented this case to both the Trial Judge and the Court of Appeals. Neither court found that it had sufficient relevance to even mention it in their respective opinions. In the *Lear* case, this court overruled the long-standing rule that a licensee was estopped to deny the validity of a licensor's patent. No one questions the vitality and impact of this decision. In the case under consideration both the licensee and the licensor were attempting to enforce a valid patent by restraining a third party, namely Petitioners, from infringing. No one at any time ever contended that the Petitioners were estopped to deny the validity of Respondents patent. The fact of the matter is that Petitioners made a very vehement denial of the validity of the Respondents' patent and a substantial portion of the six day trial was devoted exclusively to evidence relating to the validity of Respondents' patent. Petitioners had ample opportunity to, and did, raise all of the issues relating to the validity of the Plaintiffs' patent. Consequently, Respondents are at a loss, as were the two courts below, to understand how the *Lear* case could have any application to the present situation. Petitioners were not licensees, they were third party infringers. Petitioners were not precluded from raising all of the issues relating to validity and

anticipation of Respondents' invention but had every opportunity to do so.

The case of *Massilon-Cleveland-Akron Sign Co. v. Golden State Advertising Co., Inc., et al.*, 444 F. 2d 425, 170 USPQ 440 (C.A. 1970), involved a situation where a patent settlement was made prior to trial but after charges of infringement and denial of same were made. The agreement on the part of the alleged infringer covenanted (1) acknowledged validity of the patent, and (2) covenanted to refrain from directly or indirectly contesting or questioning the validity of the patent. Subsequently, upon being charged with breach of the settlement contract, the alleged infringer raised the issue of validity and the Ninth Circuit upheld its right to so challenge the validity of the patent involved on the basis of *Lear v. Adkins*. The *Massilon* case did not turn on the timeliness of a Rule 60(b) motion or the failure to use due diligence to discover evidence. Consequently it is not material to the present case.

A careful analysis of the opinions of both the Trial Judge and the Court of Appeals will indicate that there were three separate, independent and distinct grounds for denying Petitioners' motion under Rule 60(b). Each of these grounds standing alone would in and of itself have been sufficient for denial of the motion. None of the grounds involves a conflict of decision between Courts of Appeals on the same matter or involves an important question of federal law which has not been settled by this court, or involves a federal question which in any way conflicts with applicable decisions of this court. Nor, do any of the grounds relied upon or the reasons stated for the decisions below suggest a departure from well settled and established law. As a matter of fact, each of the grounds relied upon by the Trial Court and the Court of Appeals represents the application of well settled and long established principles.

2. The Petitioners' motion was not timely.

Petitioners (Defendants below) sought relief exclusively under Rule 60(b)(2) which provides for relief in certain situations for "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." The rule provides that the motion for relief shall be made "within a reasonable time" and "not more than one year after the judgment, order, or proceeding was entered or taken." The "reasonable time" limitation may cut down the one year period; it cannot, however, enlarge it. *Klapprott v. United States*, (1949) 335 U.S. 601, 336 U.S. 942. The one year period is computed generally from the entry of the final judgment and the time is not enlarged by the taking of an appeal. See *Moore's Federal Practice*, Sec. 60.28 (2), p. 320. In the case under consideration, the motion, denial of which is the subject of this appeal, was not made within the one year period. The only judgment entered by the Trial Court relating to the validity of Respondents' patent was entered on November 22, 1968.

Rule 54(a) of the Federal Rules of Civil Procedure provides that the term "Judgment" as used in the Federal Rules includes a "Decree and any order from which an appeal lies." The foregoing Judgment signed by Judge Doyle and entered by the Clerk was an appealable order within the meaning of the Federal Rules of Civil Procedure. Section 1292(a)(4), 28 U.S.C., specifically provides that the Court of Appeals shall have jurisdiction of appeals from judgments in civil actions for patent infringement which are final except for accounting. It is well settled that a judgment decreeing the validity and infringement and ordering an injunction is appealable. *American Cyanamid Co. v. Lincoln Laboratories, Inc.*, (C.A. Ill. 1968) 403, F. 2d 486; *Illinois Tool Works, Inc. v. Brunsing*, (C.A. Cal., 1967) 378 F. 2d 234.

Petitioners would readily concede that the judgment of November 22, 1968 was an appealable order, because on April 4, 1969 they filed a notice of appeal and appealed such judgment. As part of the Settlement Agreement this appeal was dismissed and the matters contained in the November 22, 1968 judgment became final and binding upon the parties and under the doctrines of res judicata and collateral estoppel could not be reopened. Under these circumstances it is perfectly apparent that the November 22, 1968 judgement became a final and binding judgment and the time for filing a motion under Rule 60(b) began to run November 22, 1968. Petitioners' motion was clearly out of time since it was not filed until March 19, 1970.

3. **The newly discovered evidence could have been discovered by due diligence in time to have it available at the trial consequently the Trial Court did not abuse his discretion in denying relief under Rule 60(b).**

Although counsel for Petitioners indicate that the affidavits filed in support of their motion to set aside the judgment were not attacked by Respondents (Petition p. 8), it is clear that such affidavits were attacked by counter affidavits which stand uncontradicted. The decision by the Court of Appeals properly reflects the condition of the record with regard to the newly discovered evidence, and Petitioners' obligation under Rule 60(b)(2). The Court of Appeals pointed out:

> "If an ordinary search of the Patent Office would have disclosed the patents upon which an appellant relies, the trial court may deny a Rule 60(b)(2) motion on the ground that due diligence was not exercised. See *Jamco, Inc. v. Carlson*, 274 F. 2d 338 (10th Cir. 1959). On the foregoing evidence, the district court found that a diligent search prior to trial would have uncovered the German patent. The mitigating factors submitted by appellants are

not devoid of merit, but on the evidence recited above, we cannot conclude that denial of the motion was a manifest abuse of discretion. Because of the decision reached herein, the other two grounds upon which the trial court denied the Rule 60(b) motion need not be considered.".

4. **The Settlement Agreement voluntarily entered into between the parties is a bar to relief under Rule 60(b).**

During the months of April and May, the following matters were pending in connection with the case now under consideration:

(1) Petitioners' appeal from the Judgment dated November 22, 1968, the Memorandum Opinion and Order entered March 7, 1969, and the Order entered March 26, 1969. The only judgment and order relating to the validity of Respondents' patent was the Judgment dated November 22, 1968.

(2) Petitioners' motion to set aside the Judgment dated April 10, 1969, relating to misuse and damages, and related Motion for New Trial, based on newly discovered evidence.

While these matters were pending and with full knowledge of the rights and remedies available to the parties, Petitioners and Respondents entered into settlement negotiations. It was natural that Petitioners should stress the vitality of their appeal attacking the November 22, 1968 Judgment determining that the Respondents' patent was valid. It was also natural they would emphasize the importance of the newly discovered evidence referred in this Motion for New Trial. Such evidence, they thought, would demonstrate that Respondents' patent had been anticipated by a device constructed in Kansas by Raymond Bird and Gerald E. Cain who had filed a patent application on their device September 28, 1949 (R 1-6).

On the other hand, in the face of this Motion for New Trial, Respondents stressed the fact that not only were Respondents entitled to $294,466.73 for infringements occurring prior to January 31, 1969, but that they were also entitled to a judgment for damages for all devices manufactured between January 31, 1969, and April 22, 1969, by Petitioners. In addition, since Respondents' patent would not expire until July of 1969, Respondents would be entitled to bring an action for all infringements, which were continuing during this period of Petitioners. The amount of damages for the infringements occurring subsequent to January 31, 1969, was very substantial and Respondents estimate additional damages would have amounted to approximately $100,000.00. It is not possible for Respondents to have determined the exact amount because information with respect to the manufacture of infringing devices subsequent to Janaury 31, 1969, was not furnished to Respondents. In any event, Respondents estimated that the total possible recovery including the original judgments, additional damages for infringements occurring after January 31, 1969, interest and court costs would approach $400,000.00.

In these circumstances, Petitioners and Respondents voluntarily, under no compulsion, in good faith and with full recognition of the rights and remedies of each, entered into the following Settlement Agreement:

"*SETTLEMENT AGREEMENT*

"THIS AGREEMENT Made this 13th day of June, 1969, by and between VALMONT INDUSTRIES, INC., hereinafter called 'VALMONT' and ENRESCO, INC., hereinafter called 'ENRESCO':

"WHEREAS, Valmont, together with Frank L. Zybach and Albert E. Trowbridge, has heretofore instituted suit against Enresco in the United States District

Court in the District of Colorado, Civil Action No. 67-C-331; and against Yuma Manufacturing Company, Inc., in the same Court, Civil Action No. 67-C-136; and

"WHEREAS, a judgment in favor of plaintiffs and against Enresco and Yuma has been entered in said lawsuit and Enresco has filed a notice of appeal therefrom and the parties hereto wish to settle the liability represented by said judgment and to avoid the expenses and uncertainties of appeal, and to provide for the payment of the liability represented by said judgment in installments;

"NOW THEREFORE, in consideration of the premises and the mutual covenants and promises contained herein, it is agreed as follows:

"1. Enresco, upon execution of this agreement, will file a dismissal of the appeal in Civil Action No. 67-C-331 and will obtain and file at the same time a dismissal of the appeal in Civil Action No. 67-C-136.

"2. Enresco will pay to Valmont the sum of $280,000.00 in the following manner:

(a) The sum of $60,000 in cash upon execution of this document.

(b) Enresco will execute and deliver upon the execution of this agreement its promissory note in the amount of $220,000.00, which note shall provide for payment of $60,000.00 plus accrued interest on December 12, 1969; $60,000.00 plus accrued interest on June 12, 1970; $50,000.00 plus accrued interest on December 12, 1970; and $50,000.00 plus accrued interest on June 12, 1971. Said note shall draw interest at the rate of 7½% per annum on the unpaid balance from June 12, 1969, and shall contain a

provision providing that the unpaid balance shall become due and payable at the option of Valmont in the event of default in any of the payments provided thereunder or in the event of any other event of default as provided herein. A copy of said note, marked "Exhibit A", is attached hereto and made a part hereof.

"3. Enresco agrees that, until the note provided for in paragraph 2 has been fully paid to Valmont:

(a) Enresco will not make unreasonable or excessive increases in the compensation of its officers and directors.

(b) Enresco will not transfer or dispose of its assets except in the ordinary course of business and will not encumber its assets for purposes other than to provide security for credit transactions entered into by Enresco which are necessary and reasonable for the operation of its business.

(c) Enresco shall not pay any dividends or otherwise distribute any of its assets.

"4. Enresco warrants and represents that the balance sheet of Enresco as of March 31, 1969, marked 'Exhibit B', attached hereto and made a part hereof, is true and correct, subject to normal autidting adjustments, and has been prepared in conformity with generally accepted accounting principles, and that there has been no material adverse change in the condition, financial or otherwise, of Enresco sincy the date hereof.

"5. Valmont agrees that it shall not levy execution upon or otherwise seek to enforce the judgments or injunctions entered in Civil Actions No. 67-C-331 and No. 67-C-136 unless an event of default, as provided in

paragraph 6 hereof, shall occur. All sums paid upon the note provided for in paragraph 2 hereof shall be credited upon said judgments. Likewise, any amount collected by execution on the judgments, after an event of default, as hereinabove provided, shall be credited against the balance of the said note. Upon full payment of the said note, Valmont shall forthwith file or cause to be filed with the Clerk of the said U.S. District Court, a release and full satisfaction of the judgments entered in Civil Action No. 67-C-331 and Civil Action No. 67-C-136, and shall also provide Enresco and Yuma with a full and complete release of all their liability for claims against them arising out of the judgments and injunction. In making this agreement, Valmont represents that it has full right, power and authority to settle and compromise the said judgments and injunctions. To secure Valmont's obligation to provide satisfactions of the judgments and the said releases, as aforesaid, Valmont promises to fully indemnify, save and hold Enresco and Yuma harmless from any claim or assertion of rights under the judgments or the injunctions by Frank L. Zybach and Albert E. Trowbridge or their personal representatives, heirs or assigns.

"6. If any of the following events of default shall occur, then the holder of the note referred to in paragraph 2 hereof may at its option declare the unpaid balance of said note to be immediately due and payable together with accrued interest thereon:

(a) Enresco does not pay any installment of said note when due; or

(b) Enresco violates any agreement contained in paragraph 3 hereof; or

(c) Any representation or warranty made by Enresco herein or in any writing furnished in connection with this agreement shall be false in any material respect when made; or

(d) Enresco makes an assignment for the benefit of creditors; or

(e) Enresco applies to any tribunal for the appointment of a trustee or receiver of its assets, or commences any proceedings relating to it under any bankruptcy, reorganization, arrangement, insolvency, readjustment of debt, dissolution or other liquidation law of any jurisdiction; or any such application is filed, or any such proceedings are commenced against Enresco and Enresco indicates its approval, consent or acquiescence, or an order is entered appointing such trustee or receiver, or adjudicating Enresco bankrupt or insolvent, or approving the petition in any such proceedings, and such order remains in effect for sixty (60) days.

"7. Immediately upon execution of this agreement by Valmont, Valmont promises and agrees to file with the Clerk of the said Court a written consent for the release of all bonds ($15,250.00 total) which have been heretofore filed with the Clerk of said Court by Enresco.

"IN WITNESS WHEREOF, the parties have hereunto set their hands the date first above written.

ENRESCO, INC.

By /s/
Charles G. Curtis, President

VALMONT INDUSTRIES, INC.

By /s/
Robert Daugherty, President"

(R 244-251)

At the time the Settlement Agreement was entered into, Petitioners were free to prosecute their appeal and to prosecute their motion for new trial. They were also free to pursue any other remedy that would affect the litigation including the filing of a motion under Rule 60(b). However, when Petitioners voluntarily entered into the Settlement Agreement, they released and relinquished all of the rights which they now seek to enforce. The Settlement Agreement was entered into in connection with a bonna fide and good faith dispute. Petitioners do not assert any fraud, misrepresentation or over-reaching. It is horn book law that unless rescinded or set aside, a valid compromise agreement operates as a merger and bar of all pre-existing claims. The compromise Settlement Agreement bars any further action in connection with the cause of action for which the compromise Settlement Agreement was made. *County of Dakota v. Glidden*, 113 U.S. 222 (1885), followed in a situation substantially identical to this case for which certiorari is now sought by the Second Circuit in *Protective Closures v. Clover Industries, Inc.*, 394 F. 2d 809.

SUMMARY

There were three separate and independent grounds relied upon by the Trial Judge for denying Petitioners' motion under Rule 60(b). Each of the grounds standing alone would have required denial of Petitioners' motion. The Trial Judge correctly relied upon well settled and long established principles of law in denying Petitioners' motion.

In the present case, unlike the *Lear* and *Massilon* cases, Petitioners have in no way been prevented from presenting their case for invalidity; in fact, they presented it fully. They had their day in court. Neither *Lear* nor *Massilon* turned on (1) the timeliness of a motion under Rule 60(b) or (2) the exercise of due diligence to procure evidence; or (3) the execution of a settlement agreement after a full blown trial on the validity of a patent. Neither *Lear* nor *Massilon* is pertinent to the present case.

The patent involved in the present suit has long since expired. No significant state or federal issue is involved. The decisions below do not present any conflict with the decisions of other Courts of Appeal or this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JOHN E. NORTH
McGRATH, NORTH, NELSON, SHKOLNICK & DWYER
1601 Woodmen Tower
Omaha, Nebraska 68102
H. ROBERT HENDERSON
HENDERSON & STROM
Des Moines, Iowa
MICHAEL A. WILLIAMS
DAWSON, NAGEL, SHERMAN & HOWARD
Denver, Colorado
Counsel for Respondents